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# The Attorney as Advocate and Witness: Does the Prohibition of an Attorney Acting as Advocate and Witness at a Judicial Trial Also Apply in Administrative Adjudications

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# **The Attorney as Advocate and Witness: Does the Prohibition of an Attorney Acting as Advocate and Witness at a Judicial Trial also Apply in Administrative Adjudications?**

**Arnold Rochvarg\***

## **I. INTRODUCTION**

It is generally accepted that an attorney who is representing a client at a judicial trial is not permitted to also be a witness at the same trial. This prohibition on an attorney acting as both an advocate and a witness at a trial appears in every state's rules of professional conduct. This rule, often referred to as the "lawyer as witness" rule, has application in attorney disciplinary proceedings, rulings on the admissibility of evidence, motions seeking disqualification of an attorney who intends to testify, legal malpractice cases, and petitions for the award of attorney's fees. The lawyer as witness rule has also been applied in administrative adjudications. There is a split of authority, however, whether the lawyer as witness rule does apply in administrative adjudications. The purpose of this article is to discuss the present state of the law with regard to the attorney/advocate as witness prohibition in administrative adjudications, and to suggest a proposal for how this issue should be handled by administrative agencies and administrative adjudicators.

## **II. THE ABA'S DEVELOPMENT OF THE ATTORNEY/ADVOCATE AS WITNESS PROHIBITION**

The American Bar Association (ABA) has been the primary force in the development of professional standards for attorneys in the

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United States. The ABA's first official statement of the prohibition on an attorney/advocate testifying as a witness was in Canon 19 of the Canons of Professional Ethics adopted in 1908.<sup>1</sup> Titled "Appearance of Lawyer as Witness for His Client," Canon 19 provided that:

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client.<sup>2</sup>

From 1908 until the mid 1960s, the ABA Canons formed the basis of the ethical standards for attorneys in every state. During these years, the language of Canon 19 was not changed.

In 1964, the ABA appointed a committee to study whether the Canons should be replaced. This committee proposed a new set of ethical standards called the Code of Professional Responsibility (Code). This Code was adopted by the ABA House of Delegates in 1969. By 1980, the Code had been adopted by just about every state, thus replacing the Canons as the standard set of ethical rules for attorneys.<sup>3</sup> The new Code addressed the attorney/advocate as witness issue in a few places. First, Disciplinary Rule (DR) 5-101(B) stated that "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness" except if the lawyer's testimony relates to (1) an uncontested matter; (2) a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition; (3) the testimony relates to the nature and value of legal services rendered; or (4) if substantial hardship would result to the client if the attorney/advocate was disqualified.<sup>4</sup> Secondly, DR 5-102 (A) provided that:

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1. ABA CANONS OF PROF'L RESPONSIBILITY, Canon 19 (1908).

2. *Id.*

3. See S. Gillers & R. Simon, Editor's Introduction, Regulation of Lawyers: Statutes and Standards, ABA Model Code of Professional Responsibility (2005).

4. ABA MODEL CODE OF PROF'L RESPONSIBILITY, DR 5-101(B) (1980).

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial . . . .<sup>5</sup>

Unlike the ABA Canons which had served as the model for the state codes of professional conduct for over sixty years, the ABA Code, including DR 5-101 and DR 5-102, had been in existence for only seven years when the ABA appointed a new commission to study whether the Code needed to be revised. This commission's recommendation was that the ABA should adopt an entirely new set of standards of professional conduct. The result of the work of this commission were the ABA Model Rules of Professional Conduct (Model Rules) which were adopted by the ABA in 1983. Most states over the next ten years replaced their versions of the ABA Code with standards based on the ABA Model Rules. The Model Rules' formulation of the "Lawyer as Witness" rule appears in Model Rule 3.7.<sup>6</sup> Rule 3.7 provides that:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.<sup>7</sup>

Since their adoption in 1983, there have been various changes made by the ABA to its Model Rules. Except for the stylistic change of replacing "except where" with "unless" before the three exceptions, Model Rule 3.7 has not been changed.

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5. *Id.*, DR 5-102(A). Ethical Considerations 5-9 and 5-10 of the ABA Code of Professional Responsibility also discuss the lawyer as witness prohibition. *Id.*

6. ABA MODEL RULES OF PROF'L CONDUCT, R. 3.7 (1983).

7. *Id.*

### *A. Support for Applying the Lawyer as Witness Rule in Administrative Adjudications*

Support for not permitting an attorney to serve the dual roles of advocate and witness at an administrative adjudication can be found in published opinions from federal administrative law judges, state courts, and state bar association ethics committees. These opinions have relied upon both the ABA Model Code and the ABA Model Rules in their analyses. This section of the article will discuss these opinions.

#### 1. Administrative Opinions

A motion to disqualify an attorney before the United States International Trade Commission (USITC) was granted by an administrative law judge (ALJ) in *In re Certain Plastic Light Duty Screw Anchors*.<sup>8</sup> The attorney who was scheduled to appear at the USITC hearing had played a major role in the negotiation and drafting of agreements that were central to the merits of the case. In a written decision, the ALJ relied on Model Code DR 5-101(B) in ordering the disqualification of the attorney because the attorney was a person who “ought to be called as a witness.”<sup>9</sup> The ALJ in this case also found the “substantial hardship” exception of DR 5-101(B) inapplicable because this exception only applied if the attorney’s testimony was “distinctive.”<sup>10</sup> Distinctiveness had not been demonstrated here. The ALJ also noted that added expense and inconvenience to the client were not sufficient to establish substantial hardship.<sup>11</sup>

In a case before the Federal Communications Commission, an ALJ relied on ABA Model Rule 3.7 in ordering the disqualification of an attorney representing an applicant for a construction permit of a new FM radio station.<sup>12</sup> The ALJ reasoned that because the attorney

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8. *In re Certain Plastic Light Duty Screw Anchors*, No. 337-TA-158, Order No. 7, 1984 WL 273813 (U.S.I.T.C., Jan. 13, 1984).

9. *Id.*

10. *Id.*

11. *Id.*

12. *In re Wind River Commc’n, Inc.*, 96 F.C.C.2d 1251 (1984).

was a “necessary witness,” disqualification of the attorney was required.<sup>13</sup> The FCC Review Board upheld the ALJ’s decision.

The Nuclear Regulatory Commission Atomic Safety and Licensing Board in *In re Houston Lighting and Power Company*, relied on both ABA Model Code DR 5-102(A) and ABA Model Rule 3.7 in deciding a motion to disqualify an attorney who was scheduled to appear as a fact witness at the upcoming hearing.<sup>14</sup> The Board concluded that both the “ought to be called as a witness” language in DR 5-102(A) and the “likely to be a necessary witness” language in Rule 3.7 applied to this attorney.<sup>15</sup> The Board denied the motion to disqualify, however, based on the substantial hardship exception in both the Model Code and the Model Rules.<sup>16</sup> Substantial hardship was demonstrated because the attorney had been lead counsel in this matter for twelve years, and had knowledge of technical matters in the “unique administrative forum” of the Nuclear Regulatory Commission.<sup>17</sup> Moreover, the Board was influenced by the opposing party’s admission that it would not be prejudiced by opposing counsel’s proposed dual roles of advocate and witness, and that the attorney’s “sophisticated client” had made an informed waiver of the issue.<sup>18</sup>

In *In re Certain Convertible Rowing Exercisers*, an ALJ in a United States International Trade Commission case also relied on both the ABA Model Code and the ABA Model Rules in deciding whether to disqualify an attorney who the opposing party intended to call as a witness.<sup>19</sup> Although recognizing that neither the ABA Model Code nor ABA Model Rules had been “formally incorporated” in the USITC’s rules of practice and procedure, the ALJ ruled that their application was appropriate under the ALJ’s “general authority to ensure fairness to all parties to this proceeding.”<sup>20</sup> The ALJ denied the motion to disqualify the attorney.

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13. *Id.*

14. *In re Wind River Commc’n, Inc.*, 96 F.C.C.2d 1251 (1984).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *In re Certain Convertible Rowing Exercisers*, No. 337-TA-212, Order No. 45, 1985 WL 303746 (U.S.I.T.C., July 30, 1985).

20. *Id.*

The ALJ ruled that the substantial hardship exception under both the Model Code and Model Rules applied because there had been a long professional relationship between the client and lawyer in this complex case which had been in preparation for a long time.<sup>21</sup> Moreover, the ALJ was influenced by the voluminous pleadings in the case and that the motion to disqualify had been filed less than one month before the hearing date.<sup>22</sup> Moreover, this case was subject to a stringent statutory time limit.<sup>23</sup> The ALJ also cited the ABA Model Rule's dual concerns for prejudice to the opposing party and potential conflict between the attorney and the client.<sup>24</sup> In this case, the ALJ wrote, the opposing party would only be prejudiced if the attorney was not allowed to testify.<sup>25</sup> Additionally, the attorney's client had no intent to call its attorney to testify. The ALJ also wrote that ABA Model Rule 3.7 "was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel."<sup>26</sup>

*United States v. Scandia Interiors, Inc.* involved a motion before the Executive Office of Immigration Review, Office of the Chief Administrative Hearing Officer, to prevent Scandia's counsel from acting in the dual capacity of advocate and witness.<sup>27</sup> The opinion relied on DR 5-101(B) of the Model Code for its conclusion that disqualification was required because the dual roles were "ethically improper."<sup>28</sup>

The General Services Administration Board of Contract Appeals applied Rule 3.7 of the District of Columbia Rules of Professional Conduct (based on ABA Model Rule 3.7) in deciding whether to disqualify the entire law firm of an attorney who would be testifying at the upcoming hearing.<sup>29</sup> The attorney had already voluntarily

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *United States v. Scandia Interiors, Inc.*, Case No. 90100229, 1990 O.C.A.H.O. LEXIS 73 (O.C.A.H.O., Nov. 26, 1990).

28. *Id.*

29. Appeal of B.G.W. Ltd. P'ship, 91-3 BCA P 24336, GSBCE No. 10501, 1991 WL 168711 (G.S.B.C.A., Aug. 28, 1991).

withdrawn from representing the client, but the motion sought disqualification of every lawyer at the firm. Because District of Columbia Rule 3.7 did not require disqualification of the entire law firm, the motion to disqualify was denied.<sup>30</sup>

In another case before the *United States International Trade Commission, In re Certain Salinomycin Biomass and Preparations Containing Same*, the ALJ relied upon the substantial hardship exception in ABA Model Rule 3.7 in denying a motion to disqualify an attorney who planned to testify at the hearing.<sup>31</sup> Substantial hardship was demonstrated based on the following factors: the attorney had been involved in all aspects of the pre-hearing phase of the investigations; the attorney had conducted almost all of the depositions; the attorney had devoted more time to the case than any other attorney; and the hearing was scheduled in less than two weeks.<sup>32</sup>

*In re Equal Access to Justice Act of Gaffny Corporation* involved a petition for attorney's fees before the United States Armed Services Board of Contract Appeals.<sup>33</sup> The petition was opposed, *inter alia*, on the ground that the petitioning party had not acted as an attorney at the earlier administrative hearing where he had also testified.<sup>34</sup> It was argued the petitioning party's role at the earlier hearing was merely in his capacity as an officer of a corporation that was a party in the case.<sup>35</sup> Two of the three administrative law judges deciding this matter voted to award most of the attorney's fees which the attorney had requested.<sup>36</sup> One ALJ dissented.<sup>37</sup> The dissent's position was that the petitioner had not acted as an attorney at the hearing and thus was not entitled to any attorney's fees.<sup>38</sup> The dissenting ALJ relied on ABA Model Rule 3.7 and DR 5-101 and DR

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30. *Id.*

31. *In re Certain Salinomycin Biomass & Preparations Containing Same*, No. 337-TA-370, Order No. 13, 1995 WL 945673 (U.S.I.T.C., May 25, 1995).

32. *Id.*

33. *In re Equal Access to Justice Act of Gaffny Corp.*, 96-1 BCA P 28060, ASBCA No. 39740, 1995 WL 669056 (A.S.B.C.A., Oct. 25, 1995).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*



5-102 of the Massachusetts Code of Professional Responsibility (based on the ABA Model Code) to support his conclusion.<sup>39</sup> The dissent reasoned that if the petitioning attorney “had appeared as a lawyer, he would have faced the ethical dilemma” of acting as both attorney and witness.<sup>40</sup> Therefore, in order to avoid finding that the attorney had engaged in unethical conduct, the proper conclusion was that the petitioner had not acted as an attorney at the earlier administrative hearing.

Although it was not necessary for its decision in *In re Certain Mechanical Lumbar Supports and Products Containing Same*, an administrative law judge in a matter before the United States International Trade Commission cited Rule 3.7 of the Michigan Rules of Professional Conduct (based on ABA Model Rule 3.7) as an alternative reason to disqualify attorneys who the ALJ had already disqualified on the ground of conflict of interest with a former client.<sup>41</sup> The ALJ noted that continued representation “would likely violate the Lawyer as Witness rule” in Rule 3.7.<sup>42</sup>

## 2. Judicial Opinions

The preceding section has demonstrated that federal administrative law judges have relied upon ABA Model Rule 3.7 and ABA Model Code DR 5-101 and DR 5-102, and state provisions based on the ABA Model Rules and ABA Model Code, in deciding various motions in administrative adjudications. Several judicial opinions at the state level are in concurrence with these administrative opinions that the ethical rules adopted by the ABA should be applied to administrative adjudications. This section will discuss these cases.

*Lavin v. Civil Service Commission*, a case from Illinois, involved the appeal of the discharge from public employment of a state safety inspector based on his alleged failure to leave inspection forms with plants he had visited.<sup>43</sup> The inspector (Lavin) testified at the

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39. *Id.*

40. *Id.*

41. *In re Certain Mech. Lumbar Supports & Prods. Containing Same*, No. 337-TA-415, 1998 ITC LEXIS 283 (U.S.I.T.C., Nov. 2, 1998).

42. *Id.* at \*17.

43. *Lavin v. Civil Serv. Comm'n*, 310 N.E.2d 858 (Ill. App. Ct. 1974).

administrative hearing that he had not visited a particular plant in over one month, thus explaining the lack of an inspection form at the plant.<sup>44</sup> An assistant attorney general who served as counsel for the Department of Labor, the employing agency, was then sworn as a rebuttal witness. He testified that he had recently seen Lavin at that plant.<sup>45</sup> Several other witnesses also testified at the hearing. In his findings, the presiding hearing officer found Lavin's testimony "incredible," and recommended discharge from service.<sup>46</sup> The Civil Service Commission adopted the hearing officer's findings and ordered Lavin's discharge.<sup>47</sup> Upon judicial review, the circuit court judge reversed the agency decision because Lavin "had not been afforded a fair and impartial trial."<sup>48</sup> The circuit court judge listed three factors as supporting his conclusion: (1) evidence had been introduced of a prior suspension of Lavin unrelated to the suspension now at issue; (2) improper contact by the state with witnesses prior to the hearing; and (3) Lavin had been improperly called as a witness by the state.<sup>49</sup> The circuit court judge made no mention of the testimony of the Assistant Attorney General at the administrative hearing. An Illinois intermediate appellate court disagreed with the circuit court judge that Lavin had been denied a fair hearing. The court rejected each reason discussed by the lower court. The appellate court, however, continued that:

Although we conclude that plaintiff was afforded a fair hearing, we condemn the conduct of the Assistant Attorney General. While acting as counsel for the Department of Labor, a public body, he abandoned his role as advocate and became a witness for the party he was representing without withdrawing from the case. The practice of acting as both advocate and witness

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44. *Id.* at 860.

45. *Id.*

46. *Id.* at 862.

47. *Id.* at 863.

48. *Id.*

49. *Id.*

has been consistently frowned upon and discouraged by the legal profession.<sup>50</sup>

The court cited Ethical Consideration 5-9 and the ABA Code of Professional Responsibility to support its position. The court added that “[i]n the instant case, the conduct was totally unnecessary and inexcusable.”<sup>51</sup> The court, however, did not provide any remedy.

*International Paper Co. v. Wilson*, involved a workers compensation claim in Arkansas.<sup>52</sup> Wilson was a worker at a paper factory whose leg was crushed by a paper machine.<sup>53</sup> As well as filing a workers compensation claim against his employer, International Paper Co., Wilson filed a products liability lawsuit in federal court against the manufacturer of the machine, Beloit Corporation.<sup>54</sup> Beloit agreed to settle with Wilson for \$50,000.<sup>55</sup> Under Arkansas law, this settlement required approval by the Workers Compensation Commission.<sup>56</sup> The settlement was presented to an administrative law judge of the Commission on a stipulation of facts along with affidavits.<sup>57</sup> Most significant to this article, one of the affidavits was filed by Wilson’s attorney.<sup>58</sup> In this sworn affidavit, he stated that: (1) he had personally examined the paper machine that had injured Wilson;<sup>59</sup> (2) he had hired an engineering firm to inspect the paper machine;<sup>60</sup> (3) it was his opinion that the products liability case filed in federal court against Beloit would most likely not be successful;<sup>61</sup> (4) it was his opinion that the acts of International Paper in losing and/or destroying certain bolts on the paper machine “weigh[ed] heavily” against a successful

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50. *Id.* at 865.

51. *Id.*

52. *Int’l Paper Co. v. Wilson*, 805 S.W.2d 668 (Ark. Ct. App. 1991).

53. *Id.* at 668.

54. *Id.*

55. *Id.*

56. *See*, ARK CODE ANN § 11-9-401(c) (1987).

57. *Int’l Paper Co.*, 805 S.W.2d at 688.

58. *Id.*

59. *Id.* at 669.

60. *Id.*

61. *Id.*

outcome against Beloit in the products liability case;<sup>62</sup> (5) it was his opinion that a better case existed against International Paper for losing or destroying the bolts;<sup>63</sup> and (6) the \$50,000 settlement with Beloit was in the best interest of his client.<sup>64</sup> Based on several affidavits, including Wilson's attorney's affidavit, the ALJ filed a written opinion which was adopted by the full Commission approving the settlement.<sup>65</sup>

The Commission's decision was then subjected to judicial review in the Arkansas Court of Appeals. On the issue relevant to this article, the court ruled that Rule 3.7 of the Model Rules of Professional Conduct applied in worker's compensation proceedings.<sup>66</sup> Rule 3.7, however, was not applicable to this case because Wilson's attorney's affidavit was a statement of advocacy, not a statement of proof by a witness.<sup>67</sup> As an alternate basis to affirm the Commission, the court applied the substantial hardship exception in Rule 3.7.<sup>68</sup> The court wrote that "[b]alancing the claimant's interest against the potential prejudice to the opposing party, . . . disqualification was not warranted."<sup>69</sup>

A judicial opinion from Wisconsin also supports the application of the lawyer as witness rule to administrative hearings. This case, *Peck v. Meda-Care Ambulance Corp.*,<sup>70</sup> involved a malpractice action by Meda-Care against its attorney because the attorney "both represented Meda-Care before a National Labor Relations Board administrative law judge, and testified before the administrative law judge in that matter on Meda-Care's behalf."<sup>71</sup> The trial court had ordered the attorney to forfeit his fees for work performed after he knew he would be a witness.<sup>72</sup> The intermediate appellate court

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62. *Id.* at 669-70.

63. *Id.* at 670.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Peck v. Meda-Care Ambulance Corp.*, 457 N.W.2d 538 (Wis. Ct. App. 1990).

71. *Id.* at 540.

72. *Id.* at 541.

discussed the lawyer as witness rule as adopted in Wisconsin, and held it applicable to the NLRB hearing.<sup>73</sup> The court denied any malpractice liability, however, holding that “it would stretch the ethical prohibition beyond its function to fashion from it a rule of per se liability of the attorney to the client.”<sup>74</sup> The court relied on the principle that violations of rules of professional conduct are not to be used to define standards of professional care as a basis for civil liability.<sup>75</sup> Significant to this article, however, is that the court accepted the applicability of the lawyer as witness rule to the earlier NLRB adjudication.

*Snyder v. State Ethics Commission*<sup>76</sup> involved a township supervisor (Snyder) who was accused of violating the Pennsylvania State Ethics Law when he voted to approve two contracts between the township and a stone company he owned.<sup>77</sup> At the administrative hearing before the State Ethics Commission, Snyder sought to call the prosecuting attorney for the Commission as a witness to testify as to when the investigation of Snyder had begun and how it had been handled.<sup>78</sup> The hearing examiner refused to permit Snyder to call the agency’s attorney as a witness.<sup>79</sup> Upon judicial review of the Commission’s ruling contrary to Snyder, the Pennsylvania court upheld the hearing examiner’s decision.<sup>80</sup> The court relied in part on Rule 3.7 of the Pennsylvania Rules of Professional Conduct for the proposition that “a lawyer may not act as an advocate in a proceeding in which the lawyer is also a witness.”<sup>81</sup> The court reasoned that because the Commission’s attorney would have been disqualified under Rule 3.7 if he had testified, the Commission would have been prejudiced.<sup>82</sup> Therefore, the hearing examiner had not abused his

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73. *Id.* at 541-43.

74. *Id.* at 543.

75. *Id.*

76. *Snyder v. State Ethics Comm’n*, 686 A.2d 843 (Pa. Commw. Ct. 1996).

77. *Id.*

78. *Id.* at 849.

79. *Id.*

80. *Id.*

81. *Id.* at 850.

82. *Id.*

discretion in refusing to allow Snyder to call the Commission's attorney as a witness.<sup>83</sup>

### *B. Informal Bar Association Ethics Committee Opinions*

There are a couple ethics opinions from state bar association ethics committees on the applicability of the attorney/advocate as witness prohibition in an administrative adjudication. Both support the position that the lawyer as witness rule does apply to administrative adjudications. The Connecticut Committee on Professional Ethics Informal Opinion 92-1<sup>84</sup> involved an attorney for the National Labor Relations Board who had been working on a series of cases for over nine years involving numerous alleged unfair labor practices.<sup>85</sup> One issue at an upcoming NLRB hearing was the impact of an earlier settlement agreement on the pending case.<sup>86</sup> An order had been issued by the NLRB permitting the employer who had been accused of unfair labor practices to present evidence of the intent of the parties in the earlier settlement agreement to support the employer's position that the charge at the upcoming hearing should not be upheld.<sup>87</sup> The attorney for the NLRB recognized that he would probably have to testify to the parties' intent in the earlier settlement agreement because he had been involved in this settlement agreement.<sup>88</sup> The NLRB attorney requested an opinion from the Connecticut Bar Association. The attorney asked if he were called to testify at the NLRB hearing whether he could still act as the attorney for the NLRB at the NLRB hearing.<sup>89</sup> The Committee on Professional Ethics of the Connecticut Bar Association relied on both DR 5-102 of the Code of Professional Responsibility and Rule 3.7 of the Rules of Professional Conduct.<sup>90</sup> It opined that the NLRB attorney could testify and still represent the NLRB at the hearing

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83. *Id.*

84. LEXIS, National Reporter on Legal Ethics and Professional Responsibility, CT Opinions.

85. *Id.* at #1.

86. *Id.*

87. *Id.*

88. *Id.* at #2.

89. *Id.*

90. *Id.* at #2 - #4.

before the NLRB ALJ “[g]iven the limited purpose and scope of your anticipated testimony, your intense involvement in all these complex matters for over six years, and the fact that your testimony will not involve substantive allegations in the case.”<sup>91</sup> It was the Committee’s opinion that under Rule 3.7(a)(3), “your disqualification would work substantial hardship on your client.”<sup>92</sup> By applying the “substantial hardship” exception in Rule 3.7, the Committee took the position that the lawyer as witness rule was applicable to the NLRB hearing.

Pennsylvania Informal Ethics Opinion 94-43<sup>93</sup> was offered in response to a query from an attorney for a state agency who sought advice whether he could represent the agency at an administrative hearing where the chief counsel of his office planned to testify.<sup>94</sup> The chief counsel had withdrawn his appearance in the case because of his upcoming testimony.<sup>95</sup> The opinion relied on Rule 3.7 of the Pennsylvania Rules of Professional Conduct to reach its conclusion that the attorney “would be able to represent your governmental agency...even though your Chief Counsel has been called to testify as a witness in the proceeding”<sup>96</sup> unless precluded by the conflict of interest rules, i.e., if the Chief Counsel’s testimony would be adverse to the interest of the agency.<sup>97</sup> By opining in this way, the Pennsylvania bar association ethics committee also took the position that the lawyer as witness rule applied to administrative hearings.

### *C. Summary*

There is substantial support in judicial opinions, administrative decisions and state bar association ethics opinions that the lawyer as witness rule that prohibits an attorney from acting as both an advocate and a witness in the same case applies to administrative adjudications. As the next section of this article will demonstrate,

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91. *Id.* at #4.

92. *Id.*

93. 1994 WL 928029 (Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp. March 28, 1994).

94. *Id.* at #1.

95. *Id.*

96. *Id.* at #2.

97. *Id.*

however, there is also support for the position that the lawyer as witness rule does not apply to administrative adjudications.

### III. SUPPORT FOR THE POSITION THAT THE LAWYER AS WITNESS RULE DOES NOT APPLY TO ADMINISTRATIVE ADJUDICATIONS

Contrary to the discussion in the preceding section of this article, there is authority that rejects application of the lawyer as witness rule to administrative adjudications. These authorities base their conclusion on the language of the lawyer as witness provisions in the ABA Model Code and ABA Model Rules, and on the differences between judicial trials and administrative hearings. This section will discuss these authorities.

*Robinhood Trails Neighbors v. Winston Salem Zoning Board of Adjustment*,<sup>98</sup> a North Carolina case, involved a challenge by neighborhood residents to the issuance of an off-street parking special use permit.<sup>99</sup> At the hearing before the Board of Zoning Adjustment, the applicant presented the sworn testimony of its counsel presenting over 1,000 signatures of persons who supported the zoning change.<sup>100</sup> The attorney, while under oath, also stated that the subject property was already used for commercial reasons, and that a bank was across the road.<sup>101</sup> He added that additional parking would promote safety, would not decrease property values, and that the lot would be in "harmony" with the rest of the area.<sup>102</sup> After the close of evidence, the Board approved the special use permit for the parking lot.<sup>103</sup> At issue on judicial review was whether the applicant's attorney had violated North Carolina Code of Professional Responsibility DR 5-102, based on the ABA Model Code of Professional Responsibility, when he presented sworn testimony as a witness at the zoning hearing, and if so, whether the attorney's testimony could be considered in the court's analysis whether the Board's decision was supported by substantial

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98. *Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment*, 261 S.E.2d 520 (N.C. Ct. App. 1980).

99. *Id.* at 521.

100. *Id.*

101. *Id.*

102. *Id.* at 521-22.

103. *Id.* at 522.



evidence.<sup>104</sup> The North Carolina appellate court held that DR 5-102 did not apply to the zoning hearing. It could “not find a compelling reason to extend existing law by holding that the evidence presented by an attorney who testifies while representing a client before a local administrative board may not be considered by the local administrative board.”<sup>105</sup> The court was especially influenced by the fact that the formal rules of evidence that apply in judicial trials are not binding on administrative hearings.<sup>106</sup> Therefore, the attorney’s testimony was properly part of the administrative record, and the agency’s decision was supported by substantial evidence.<sup>107</sup>

Despite its holding that the lawyer as witness rule did not apply to administrative hearings, the North Carolina Court “strongly discourage[d] attorneys from serving as both a witness and an advocate, even if before local administrative boards, unless the exceptions in DR 5-101(B) or other compelling circumstances exist.”<sup>108</sup> This “strong discouragement” was based on the policy considerations of the lawyer as witness rule as set forth in Ethical Consideration 5-9.<sup>109</sup>

More recently, the Maryland Court of Special Appeals, an intermediate appellate court, held that the lawyer as witness rule did not apply to administrative adjudications. *Heard v. Foxshire*

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104. *Id.* at 522-23.

105. *Id.* at 523.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* Ethical Consideration 5-9 provides:

Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another; while that of a witness is to state facts objectively.

*Id.*

*Associates, LLC*,<sup>110</sup> involved a decision by a county board of zoning appeals to approve a commercial shopping center in a residential area.<sup>111</sup> One issue was how the opening statement of the applicant's attorney at the zoning hearing should be treated in determining whether there was substantial evidence in the record to support the Board's decision.<sup>112</sup> At the opening of the administrative hearing, the presiding officer had asked all persons who planned to testify to stand, raise their right hand, and take an oath to tell the truth.<sup>113</sup> Several persons were so sworn; the attorney for the applicant did not stand or take the oath.<sup>114</sup> The attorney in response to a question from the presiding officer then stated that he had an opening statement.<sup>115</sup> The attorney then "proceeded to offer a substantial narrative of his client's proposed use of the . . . lot."<sup>116</sup> After this opening statement, a representative from an engineering and planning firm testified as to the intended use of the driveway, and how the driveway could be made "more palatable" to the neighbors in opposition.<sup>117</sup> This witness did not discuss the engineering feasibility of the project nor any traffic studies.<sup>118</sup> No other witnesses were called.<sup>119</sup> The Board's approval of the project was challenged by neighbors. One basis of the challenge was that the Board had based its decision on the opening statement of the applicant's attorney.<sup>120</sup>

The Maryland intermediate appellate court first discussed the competency of an attorney for a party to give evidence before an administrative agency.<sup>121</sup> The court discussed earlier Maryland cases that bore on this issue. One case<sup>122</sup> involved a zoning reclassification that had been reversed by the court because of insufficient evidence

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110. *Heard v. Foxshire Assocs., LLC*, 806 A.2d 348 (Md. App. 2002).

111. *Id.* at 330.

112. *Id.* at 352.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 353.

121. *Id.*

122. *Baker v. Montgomery County*, 215 A.2d 831 (Md. 1966).

when the only person who testified in favor of the requested rezoning at the council hearing was the attorney for the applicant.<sup>123</sup> This holding was “not because the evidence . . . was given by applicant’s attorney, but because there was no evidence produced to establish that there had been a change in conditions” in the area.<sup>124</sup> Another Maryland case<sup>125</sup> had decided to “leave to another case a more particularized exploration of whether counsel representing a party in a zoning matter should testify as a fact or opinion witness.”<sup>126</sup> The Heard court then discussed Rule 3.7 of the Maryland Rules of Professional Conduct which provides that “a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness.”<sup>127</sup> The court noted that although there were an “abundance of cases [involving] . . . trials of contested matters before a court of record . . . there is a dearth of cases relating to . . . whether an attorney for a party should give evidence on behalf of that client at an administrative hearing.”<sup>128</sup> The court recognized that courts in other jurisdictions “have reached disparate results.”<sup>129</sup> The Maryland Court then held that the attorney/advocate as witness prohibition did not apply to administrative hearings.<sup>130</sup> This was true because the Rules of Professional Responsibility “draw a distinction between counsel’s conduct in trials before courts of record and hearings conducted by legislative or adjudicatory bodies.”<sup>131</sup> The court then cited Black’s Law Dictionary: “A trial is a judicial examination and determination of issues between parties to an action.”<sup>132</sup> A “hearing in comparison is a proceeding of relative formality . . . with definite issues of fact or of law to be tried. It is frequently used in a broader and more popular significance to describe whatever takes place

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123. *Heard*, 806 A.2d at 353 (Baker (Md. 1996)).

124. *Heard*, 806 A.2d at 353.

125. *Richmarr Helly Hills, Inc. v. American PCS*, 701 A.2d 879 (Md. App. 1997).

126. *Id.* at 887 n.11.

127. *Heard*, 806 A.2d at 354.

128. *Id.*

129. *Id.*

130. *Id.* at 355.

131. *Id.*

132. *Id.*

before magistrates . . . and to hearings before administrative agencies.”<sup>133</sup>

The Maryland court then discussed the Comment to Rule 3.9 of the Maryland Rules of Professional Conduct. This Comment provides that “in representation before bodies such as . . . executive and administrative agencies . . . lawyers present facts, formulate issues and advance argument on the matter under consideration . . . . Legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.”<sup>134</sup> Comparing Rule 3.7 and Rule 3.9, the Maryland court concluded that a distinction exists between a “trial” and a “hearing” when analyzing the applicability of the Rules of Professional Conduct.<sup>135</sup> It held that the Rules of Professional Conduct do not preclude the giving of evidence by an attorney for a party before an administrative agency.<sup>136</sup> The Maryland court then set forth parameters for testimony given by the attorney/advocate at an administrative hearing.<sup>137</sup> The testimony by the attorney/advocate must be given under oath as a sworn witness.<sup>138</sup> It cannot be given “by way of statement or narrative as an advocate.”<sup>139</sup> In *Heard*, the attorney had not been sworn as a witness; therefore, what the attorney stated at the hearing about the proposed use of the shopping center was only argument, not evidence.<sup>140</sup> The court finally held that since the “evidence” presented by the applicant’s attorney could not be considered, the Board’s decision was not supported by substantial evidence.<sup>141</sup>

The Maryland court’s textual analysis in *Heard* deserves further attention. As discussed below, the language used by the ABA in its formulations of the lawyer as witness rule, and the rule as adopted in

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

most states, may indicate that the lawyer as witness rule does not apply to administrative adjudications.

The ABA's original formulation of the lawyer as witness rule, Canon 19, provided that "a lawyer should avoid testifying in court on behalf of his client."<sup>142</sup> The use of the word "court" in Canon 19 could be construed to mean that the lawyer as witness prohibition was intended to apply only to judicial proceedings. Administrative forums are rarely, if ever, referred to as "courts." Considering that administrative adjudications played an extremely minor role in the legal process and professional lives of attorneys at the time Canon 19 was drafted and initially adopted – the beginning of the twentieth century – it does seem likely that there was no intent to apply the lawyer as witness rule to administrative adjudications in Canon 19.

From the beginning of the twentieth century until the mid 1960s, Canon 19 was the accepted statement of the lawyer as witness rule in every state. Despite the increased role of administrative adjudications during this period, the language of Canon 19 was not changed. In 1969, however, the ABA approved the Model Code of Professional Responsibility. Two provisions of the new Code replaced Canon 19. Disciplinary Rule 5-101(B) addressed the lawyer as witness prohibition in terms of not accepting "employment in contemplated or pending litigation."<sup>143</sup> Disciplinary Rule 5-102 was concerned with "withdrawing from the conduct of the trial."<sup>144</sup> The significance of the ABA's abandonment of the word "court" in Canon 19 and adoption of the words "litigation" and "trial" in the Model Code is not clear. It could be argued that the intent of the Model Code was to expand the application of the lawyer as witness rule beyond judicial proceedings to now include administrative hearings. "Litigation" is broad enough to cover administrative hearings. Less clear is the intent of the word "trial" in the Model Code. The word "trial" is usually limited to judicial proceedings. Administrative adjudications are typically referred to as hearings, although "trial" is sometimes used in reference to administrative adjudications.<sup>145</sup> Although it is not entirely clear, it is this article's

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142. ABA CANONS OF PROF. ETHICS Canon 19 (1908).

143. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(B) (1969).

144. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-102(B) (1969).

145. *See In the Matter of Certain Plastic Light Duty Screw Anchors*, 1984 WL 273813 (USITC 1984) where the ALJ referred to the motion to disqualify "trial

conclusion that the use of “litigation” and “trial” in the Model Code do not demonstrate the ABA’s intent to expand the lawyer as witness rule beyond that covered by Canon 19, i.e., trials within the judicial branch. There is nothing that supports the conclusion that DR 5-101 and DR 5-102 were adopted to expand the scope of Canon 19 to also cover administrative adjudications.

In 1983, the Model Rules of Professional Conduct were adopted by the ABA. The lawyer as witness rule now appeared as Model Rule 3.7. The new rule dropped the term “litigation” which had appeared in DR 5-101, and referred only to a “trial” which had appeared in DR 5-102. This decision may be interpreted to mean that the new Model Rule 3.7 was intended to clarify that the lawyer as witness rule should not apply to all litigation, but only judicial litigation, i.e., only “trials.” This seems plausible, although no authority has been found for this conclusion. It does seem curious, in light of the expansion of administrative adjudications from the 1960s to the 1980s, that Model Rule 3.7 was limited to a “trial.” The Comments to Rule 3.7 may provide more insight (or confusion). In its discussion of the exception, which permits an attorney/advocate to testify as to the nature and value of legal services, Comment [3] states that “in such a situation the judge has firsthand knowledge of the matter in issue.” Although many administrative agency adjudicators have the title “administrative law judge” and are often referred to as “judge,” many, probably most, administrative adjudicators in the United States have titles such as “hearing officer,” “hearing examiner,” or “presiding officer” and are not referred to as “judge.” If it was the intent of the ABA in the Model Rules to apply the “lawyer as witness” rule to agency adjudicators, the word “judge” in the Comment to Model Rule 3.7 would not seem to be the appropriate word to use.

The language of Model Rule 3.7 has remained the same since its adoption in 1983, except for the stylistic change of replacing “except where” with “unless” before the three exceptions when an attorney/advocate is permitted to testify. In 2002, however, based on the recommendation from the Ethics 2000 Commission, the Comments to Model Rule 3.7 were amended. Most relevant to this article is that the new Comments to Model Rule 3.7 use the word

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counsel,” and discussed whether counsel should be disqualified from serving as advocate at the “trial.”

“tribunal.” Comment [1] provides that “[c]ombining the roles of advocate and witness can prejudice the tribunal . . . .” Comment [2] adds that the “tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness.” Comment [3] continues: “[t]o protect the tribunal, [Model Rule 3.7(a)] prohibits a lawyer from simultaneously serving as advocate and necessary witness . . . .” Comment [4] discusses the “balance” between the “interests of the client and those of the tribunal and the opposing party,” and “whether the tribunal is likely to be misled.” Finally, Comment [5] refers to situations where the “tribunal is not likely to be misled.” The use of “tribunal” in the Comments is significant in light of the ABA’s adoption in 2002 of a new Model Rule 1.0(m), Terminology: “Tribunal” New Model Rule 1.0(m) provides that:

“Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.<sup>146</sup>

The new Comments to Model Rule 3.7, coupled with the new definition of “Tribunal” in Model Rule 1.0(m), demonstrate that in 2002, the ABA attempted to express its intent that the “lawyer as witness” rule should apply to administrative adjudications. It must be emphasized, however, that although the Comments were changed in 2002, to reflect this position, the text of Model Rule 3.7 was not changed. Model Rule 3.7 was not amended to add “tribunal.” Nor was the word “trial” changed to “adjudicative body” or other similar term in Model Rule 3.7.<sup>147</sup>

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146. MODEL RULES OF PROF’L CONDUCT R. 1.0(m) (2002).

147. Adding to the lack of certainty on the ABA’s position on this issue is that the amended Comment [6] to Model Rule 3.7 refers to “determining if it is

Significant to this article is that only a handful of states have adopted the most recent ABA formulation of the “lawyer as witness” rule as expressed in Model Rule 3.7 and the 2002 Comment amendments. Only Arizona,<sup>148</sup> Delaware,<sup>149</sup> Idaho,<sup>150</sup> Maryland<sup>151</sup> South Dakota,<sup>152</sup> and Utah<sup>153</sup> amended their Comment to Rule 3.7 to include the reference to a tribunal. The adoption of the new Comment to Rule 3.7 could support the argument that the “lawyer as witness” rule applies to administrative hearings in these states. However, none of these states changed the language in the actual rule to reflect the change in the Comment. This could be construed to mean either that the adoption of the new Comment was not intended to substantively change the Rule to include administrative hearings, or that the Rule already covered administrative adjudications and consequently did not require amendment. This latter argument would not seem plausible in a state such as Maryland where a court has expressly held the language of Maryland Rule 3.7 does not apply in administrative adjudications.<sup>154</sup>

The majority of states have in place a “lawyer as witness” rule which tracks the ABA approach prior to the 2002 Comment amendments. In other words, the rule in the majority of states is limited to a “trial,” and the Comments in the majority of states refers to a proceeding before a “judge.” Those states that have not adopted the ABA’s most recent comments (which is the only statement by the ABA that the “lawyer as witness” rule applies to administrative adjudication), include Alabama,<sup>155</sup> Alaska,<sup>156</sup> Arkansas,<sup>157</sup> Colorado,<sup>158</sup> Connecticut,<sup>159</sup> District of Columbia,<sup>160</sup> Florida,<sup>161</sup>

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permissible to act as an advocate in a trial.” The term “trial” is also used in other Comments to Rule 3.7. Model Rule.

148. ARIZONA RULES OF PROF’L CONDUCT, R. 3.7 (2002).

149. DELAWARE LAWYERS’ RULES OF PROF’L CONDUCT, R. 3.7 (2002).

150. IDAHO RULES OF PROF’L CONDUCT, R. 3.7 (2002).

151. MARYLAND RULES OF PROF’L CONDUCT, R. 3.7 (2002).

152. SOUTH DAKOTA RULES OF PROF’L CONDUCT, R. 3.7 (2002).

153. UTAH RULES OF PROF’L CONDUCT, R. 3.7 (2002).

154. *Heard v. Foxshire Ass’n, LLC*, 806 A.2d 348 (Md. App. 2002).

155. ALABAMA RULES OF PROF’L CONDUCT R. 3.7 (2002).

156. ALASKA RULES OF PROFESSIONAL CONDUCT R. 3.7 (2002).

157. ARKANSAS RULES OF PROF’L CONDUCT R. 3.7 (2002).

158. COLORADO RULES OF PROF’L CONDUCT R. 3.7 (2002).



Georgia,<sup>162</sup> Hawaii,<sup>163</sup> Indiana,<sup>164</sup> Kansas,<sup>165</sup> Kentucky,<sup>166</sup> Louisiana,<sup>167</sup> Massachusetts,<sup>168</sup> Michigan,<sup>169</sup> Minnesota,<sup>170</sup> Mississippi,<sup>171</sup> Missouri,<sup>172</sup> Montana,<sup>173</sup> Nevada,<sup>174</sup> New Hampshire,<sup>175</sup> New Jersey,<sup>176</sup> New Mexico,<sup>177</sup> North Carolina,<sup>178</sup> North Dakota,<sup>179</sup> Oklahoma,<sup>180</sup> Oregon,<sup>181</sup> Pennsylvania,<sup>182</sup> Rhode Island,<sup>183</sup> South Carolina,<sup>184</sup> Tennessee,<sup>185</sup> Vermont,<sup>186</sup> Washington,<sup>187</sup> West Virginia,<sup>188</sup> Wisconsin,<sup>189</sup> and Wyoming.<sup>190</sup> In these states, it is not clear whether the “lawyer as witness” rule applies to administrative adjudications. This article submits that in

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159. CONNECTICUT RULES OF PROF'L CONDUCT R. 3.7 (2002).

160. DISTRICT OF COLUMBIA RULES OF PROF'L CONDUCT R. 3.7 (2002).

161. FLORIDA BAR REGULATION 4-3.7 (2002).

162. GEORGIA RULES AND REGULATIONS, STATE BAR 4-102(D), 3.7 (2002).

163. HAWAII RULES OF PROF'L CONDUCT R. 3.7 (2002).

164. BURNS INDIANA RULES OF PROF'L CONDUCT R. 3.7 (2002).

165. KANSAS RULES OF PROF'L CONDUCT R. 3.7 (2002).

166. KENTUCKY SUPREME COURT RULES R. 3.7 (2002).

167. LOUISIANA RULES OF PROF'L CONDUCT R. 3.7 (2002).

168. ANN. LAW OF MASSACHUSETTS SUPREME JUDICIAL COURT R. 3.07 (2002).

169. MICHIGAN RULES OF PROF'L CONDUCT R. 3.7 (2002).

170. MINNESOTA RULES OF PROF'L CONDUCT R. 3.7 (2002).

171. MISSISSIPPI RULES OF PROF'L CONDUCT R. 3.7 (2002).

172. MISSOURI SUPREME COURT RULES R. 4-3.7 (2002).

173. MONTANA RULES OF PROF'L CONDUCT R. 3.7 (2002).

174. NEVADA SUPREME COURT RULES R. 178 (2002).

175. NEW HAMPSHIRE RULES OF PROF'L CONDUCT R. 3.7 (2002).

176. NEW JERSEY RULES OF PROF'L CONDUCT R. 3.7 (2002).

177. NEW MEXICO RULES OF PROF'L CONDUCT R. 16-307 (2002).

178. NORTH CAROLINA RULES OF PROF'L CONDUCT R. 3.7 (2002).

179. NORTH DAKOTA RULES OF PROF'L CONDUCT R. 3.7 (2002).

180. OKLAHOMA STATE RULES CHAPTER 1, APPENDIX 3-A, R. 3.7 (2002).

181. OREGON CODE OF PROF'L RESPONSIBILITY R. 5-102 (2002).

182. PENNSYLVANIA RULES OF PROF'L CONDUCT R. 3.7 (2002).

183. RHODE ISLAND SUPREME COURT, ART. V, R. 3.7 (2002).

184. SOUTH CAROLINA APPELLATE COURT RULES R. 3.7 (2002).

185. TENNESSEE RULES OF PROF'L CONDUCT R. 3.7 (2002).

186. VERMONT PROF'L CONDUCT RULES R. 3.7 (2002).

187. WASHINGTON RULES OF PROFESSIONAL CONDUCT R. 3.7 (2002).

188. WEST VIRGINIA RULES OF PROF'L CONDUCT R. 3.7 (2002).

189. WISCONSIN SUPREME COURT RULES R. 20:3.7 (2002).

190. WYOMING RULES OF PROF'L CONDUCT R. 3.7 (2002).

light of the 2002 Comment amendments by the ABA and the failure of these states to adopt these amendments, a strong argument exists that the “lawyer as witness” rule does not apply to administrative adjudication in the majority of states.

Further support for the position that a majority of states have not adopted a “lawyer as witness” rule for administrative adjudications is found in states that have adopted a “lawyer as witness” rule different from the ABA Model Rule 3.7. Virginia recently adopted a “lawyer as witness” rule that applies to any “adversarial proceeding.”<sup>191</sup> In the Commentary written by the committee which drafted the new rule, the committee stated that it modified ABA Model Rule 3.7 because it concluded that the Virginia “lawyer as witness” rule should “apply not just to trials, but to any adversarial proceeding.”<sup>192</sup> The intent of the Virginia rule is clear; the attorney/advocate as witness prohibition applies to administrative adjudications.

Texas also does not follow ABA Model Rule 3.7. Texas Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct provides that a “lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness . . . .”<sup>193</sup> Comments [1] and [2] to this Rule also use the term “adjudicatory hearing” in discussing the application of this prohibition. Comment [8] refers to a lawyer’s “presentation to a tribunal,” and “taking an active role before the tribunal.” The use of terms such as tribunal, adjudicatory proceeding, and adjudicatory hearing in the “lawyer as witness” rule in Texas and accompanying comments indicate that the Texas version of the “lawyer as witness” rule applies to administrative hearings. It also lends support to the argument that the rule adopted in the majority of states does not apply to administrative hearings.

New York is another state that has a “lawyer as witness” rule different from most states. For the most part, the New York standards for professional conduct are based on the older ABA Model Code of Professional Responsibility, but the New York attorney/advocate as witness rule differs from the older ABA Model

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191. RULES OF THE SUPREME COURT OF VIRGINIA, RULES OF PROF’L CONDUCT R. 3.7 (2002).

192. *Id.* at Commentary.

193. TEXAS RULES OF PROF’L CONDUCT R. 3.08 (2002).

Code position. New York DR 5-102(a) provides that “A lawyer shall not act or accept employment that contemplates the lawyer’s acting as an advocate on issues of fact before any tribunal,”<sup>194</sup> except in a few situations. “Tribunal” is defined in Section 1200.01 as including “all courts, arbitrators and other adjudicatory bodies.”<sup>195</sup> New York DR 5-102(b) then provides that a lawyer shall not accept employment in “contemplated or pending litigation” if the lawyer may be called as a witness. Subsections (c) and (d) of New York DR 5-102 also reference “contemplated or pending litigation.” The language of the New York rule therefore indicates that the attorney/advocate as witness prohibition applies in administrative hearings. Significantly, the language of the New York rules serves to contrast with the more limited language of the ABA Model Rule 3.7 and the rule adopted in the majority of states.

Illinois also uses the phrase “contemplated or pending litigation” in its Rule 3.7,<sup>196</sup> but this phrase is stated in reference to a “trial.”<sup>197</sup> An Illinois intermediate appellate court had construed an earlier version of the Illinois “lawyer as witness” rule which included language similar to the current Illinois Rule 3.7 to apply only to jury trials.<sup>198</sup> California’s rule expressly is limited to jury trials,<sup>199</sup> and thus clearly does not apply to administrative hearings. Ohio’s “lawyer as witness” rule applies to “contemplated or pending litigation” at a “trial.”<sup>200</sup> Ohio has not construed its rule, and thus it is unclear whether it would apply to an administrative hearing. Maine applies its “lawyer as witness” rule to “contemplated or pending litigation,” and does not later refer to a “trial.”<sup>201</sup> This might

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194. NEW YORK CONSOLIDATED LAW SERVICE JUDICIARY LAW APPENDIX, CODE OF PROF’L RESPONSIBILITY DR-5-102 (2002).

195. NEW YORK CONSOLIDATED STATUTES § 1200.01 (2002).

196. ILLINOIS SUPREME COURT RULES OF PROF’L CONDUCT R. 3.7(A) (2002).

197. ILLINOIS SUPREME COURT RULES OF PROF’L CONDUCT R. 3.7(C) (2002).

198. *In re Marriage of Lee*, 481 N.E.2d 1045 (Ill. App. Ct. 1985). This case is inconsistent with *Lavin v. Civil Serv. Comm’n*, discussed earlier. See *supra* note 12 and accompanying text.

199. RULES OF PROF’L CONDUCT OF THE STATE BAR OF CALIFORNIA R. 5-210 (2002). See *In re Mortgage & Realty Trust*, 95 Bank Rptr. 740 (C.D. Cal. 1996).

200. OHIO CODE OF PROF’L RESPONSIBILITY DR 5-102 (2002).

201. MAINE BAR RULES, CODE OF PROF’L RESPONSIBILITY 3.4(G) (2002).

be interpreted to mean that Maine would apply its Rule to administrative adjudications, but this is far from certain.

Nebraska's "lawyer as witness" rule is based on the older ABA Model Code Ethical Considerations.<sup>202</sup> A 1966 Nebraska case interpreted the previous Nebraska "lawyer as witness" rule which was based on the ABA Canons to mean that "a lawyer should avoid testifying in court [on] behalf of his client."<sup>203</sup> This "in court" statement could easily be construed as excluding the rule's application to administrative adjudications, but the breadth of the present rule in Nebraska is far from clear. Iowa's "lawyer as witness" rule<sup>204</sup> is almost identical to that of Nebraska's. It does not appear to have been interpreted by any Iowa court.

The preceding analysis of the "lawyer as witness" rules in the different states has been presented to show that the text of the "lawyer as witness" rule in the majority of states does not clearly establish that the "lawyer as witness" rule applies in administrative adjudications. Further support for the position that the majority of states may not apply the "lawyer as witness" rule to administrative adjudications is found in the American Law Institute's (ALI) Restatement of the Law Governing Lawyers. The Restatement's Section 108, entitled "An Advocate as a Witness," provides that:

[A] lawyer may not represent a client in a contested case or trial of a matter in which the lawyer is expected to testify for the lawyer's client, or the lawyer does not intend to testify but the lawyer's testimony would be material to establishing a claim or defense of the client and the client has not consented . . . to the lawyer's intention not to testify.<sup>205</sup>

This Restatement section also includes exceptions for testimony relating to uncontested matters, testimony relating to the nature and value of legal services, and if substantial hardship would result from disqualification. Client waiver is also recognized. Section 108(c)

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202. NEBRASKA CODE OF PROF'L RESPONSIBILITY EC5-10 (2002).

203. *Nebraska v. Newman*, 140 N.W.2d 406 (Neb. 1966).

204. IOWA CODE OF PROF'L RESPONSIBILITY EC 5-10 (2002).

205. ALI, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 108(1) (2000).

adds that “[a] lawyer may not represent a client in a litigated matter pending before a tribunal when the lawyer or a lawyer in the lawyer’s firm will give testimony materially adverse to the position of the lawyer’s client . . . or former client . . . .”<sup>206</sup> Moreover, this subsection states that “[a] tribunal should not permit a lawyer to call opposing trial counsel as a witness unless there is compelling need for the lawyer’s testimony.”<sup>207</sup>

The Restatement’s use of the terms “contested hearing” and “tribunal” indicates that the Restatement position is that the “lawyer as witness” rule applies to administrative adjudications. “Tribunal” is defined in the Restatement to include “a court, administrative hearing board, or similar formal body hearing a contested matter under rules of procedure and evidence.”<sup>208</sup> The Introductory Note to Chapter 7, “Representing Clients In Litigation,” further provides that whether “the rules considered in this chapter apply depends on whether the particular procedure in which a lawyer may be engaged has characteristics . . . of the adversary system.”<sup>209</sup> Moreover, the term “contested case” is a term of art in administrative law typically defined as “a proceeding before an agency to determine a right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after an opportunity for an agency hearing.”<sup>210</sup> Also relevant is Restatement Section 104 which provides in part that a lawyer representing a client “in an adjudicative proceeding before a government agency or involving such an agency as a participant, has the legal rights and responsibilities of an advocate in a proceeding before a judicial tribunal.”<sup>211</sup>

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206. *Id.* at § 108(3) (2000).

207. *Id.* at § 108(4) (2000).

208. *Id.* at Introductory Note, 134 (2000).

209. *Id.*

210. *See* Md. Code Ann., State Gov’t, § 10-202(d)(1). The Model State Administrative Procedure Act of 1981 uses the term “administrative proceeding” rather than the term “contested case” which was used in the Model State Administrative Procedure Act of 1961. While the 1981 Model Act does not define “administrative proceedings” it does establish an elaborate set of procedures applicable to such proceedings. *See* Model State Administrative Procedure Act §§ 4-101, 4-102 (1981).

211. ALI, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS, § 104(3)(a) (2000).

The language of the “lawyer as witness” rule adopted in the ALI’s Restatement of Law Governing Lawyers is in stark contrast to the language of ABA Model Rule 3.7 as adopted in the majority of states. The Restatement position is clear -- no distinction should exist between judicial trials and administrative adjudications in regards to the “lawyer as witness” rule. In both settings, the attorney/advocate cannot testify as a witness. No state has adopted the Restatement formulation.

### *Summary*

This article has presented the authorities that support the view that the “lawyer as witness” rule applies in administrative adjudications, and has also presented authorities and arguments that the “lawyer as witness” rule as adopted in the majority of states does not apply to administrative adjudications. It is this article’s position that enough uncertainty exists in most states that this issue needs to be clarified. Attorneys and administrative adjudicators should have clearer guidance on this issue. The remainder of this article will discuss a proposed solution. It is submitted that the resolution of whether the “lawyer as witness” rule applies to administrative adjudications should be based on the policies underlying the “lawyer as witness” rule and the policies underlying the administrative adjudicatory process. It is also submitted that any solution should be adopted as a procedural rule by administrative agencies as part of each agency’s power to regulate its own hearings.

#### IV. TOWARDS A PROPOSED SOLUTION: THE POLICIES BEHIND THE “LAWYER AS WITNESS” RULE

In deciding whether the “lawyer as witness” rule should apply to administrative adjudications, an analysis of whether the policies which support the rule in judicial proceedings also apply to administrative adjudications seems useful. As will be discussed in this section, most, but not all, of the policy reasons for the “lawyer as witness” rule in judicial proceedings apply to administrative adjudications. Therefore, this policy analysis supports the application of the “lawyer as witness” rule in administrative hearings. However, as the next section will discuss, differences between the judicial process and the administrative process may lead to the

conclusion that a different formulation of the “lawyer as witness” rule should be adopted for administrative adjudications.

Various policy reasons have been offered why an attorney who is representing a client as an advocate should not also offer testimony as a witness. Some of these policy reasons conflict with each other. Some have been criticized as illegitimate. As one commentator has written,

[T]he literature has shown remarkable uncertainty over the reasons for the rule. Explanations have been extended by some, only to be refuted by others who offer their own rationales, which still others reject in turn. Regrettably, neither the recently formulated Code of Professional Responsibility nor a recent Formal Opinion of the American Bar Association’s Committee on Ethics and Professional Responsibility clarifies the matter. Rather, they seem to contain a hodgepodge of different reasons variously asserted over the years in support of the rule.<sup>212</sup>

Nevertheless, a discussion of this “hodgepodge” of policy reasons for the “lawyer as witness” rule is useful to this article’s attempt to offer a proposal on the application of the rule to administrative adjudications. This is true because this article’s concern is not whether the policy considerations are valid, but rather whether they apply differently to judicial and administrative adjudications.

One justification for the “lawyer as witness” rule is that the dual role of advocate and witness is confusing to lay jurors. This seems to be the basis of the first pronouncement of the prohibition in the 1846 English case, *Stones v. Byron*.<sup>213</sup> In that case, the judge ruled evidence offered by an attorney inadmissible.

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212. Arnold N. Enker, *The Rationale of the Rule That Forbids a Lawyer To Be Advocate and Witness in the Same Case*, 1977 AM. B. FOUND. RES. J. 455, 456 (1977).

213. *Stones v. Byron*, 4 Dowl. & L. 393 (1846).

## V. TOWARDS A PROPOSED SOLUTION: THE POLICIES BEHIND THE LAWYER AS WITNESS RULE

In deciding whether the lawyer as witness rule should apply to administrative adjudications, an analysis of whether the policies which support the rule in judicial proceedings also apply to administrative adjudications seems useful. As will be discussed in this section, most, but not all, of the policy reasons for the lawyer as witness rule in judicial proceedings apply to administrative adjudications. Therefore, this policy analysis supports the application of the lawyer as witness rule in administrative hearings. However, as the next section will discuss, differences between the judicial process and the administrative process may lead to the conclusion that a different formulation of the lawyer as witness rule should be adopted for administrative adjudications.

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214. Enker, *supra* note 212.



English case, *Stones v. Byron*.<sup>215</sup> In that case, the judge ruled evidence offered by an attorney inadmissible. The judge wrote:

The characters of an advocate and a witness should be sedulously kept apart. The one was a person zealously and warmly espousing the interests of his client; the other a person sworn fairly and impartially, without bias or favor to either party, to tell the truth of what he had witnessed or heard. The jury might have considerable difficulty in separating those statements which they had heard from a person as advocate, from those which they had heard from the same person as witness.<sup>216</sup>

Likewise, Professor Wigmore wrote that the lawyer as witness rule was supported by the:

[F]ear that the testimony of the counsel and his statements in argument might be so identified in the minds of the jury that they would give to the argument a testimonial credit and effect, as if the oath of the counsel as witness were pledged to it, and thus be unduly impressed with its weight.<sup>217</sup>

Similarly, it has been stated that when a lawyer is both advocate and witness the "jury will attach more importance to the testimony of a lawyer in a case than to an ordinary witness."<sup>218</sup>

If the lawyer as witness rule is based solely on its significance in jury trials, then the lawyer as witness rule should have no place at administrative adjudications for the obvious reason that there are no

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215. *Stones*, 4 Dowl. & L. 393 (1846).

216. *Id.* at 394.

217. 6 JOHN HENRY WIGMORE, EVIDENCE § 1911(3) (4th ed. 1976); *see also* *Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 430-32 (Tex. 1996) (Owen, J., dissenting).

218. *Enker*, *supra* note 212, at 460 (quoting *State v. Ryan*, 22 P.2d 418, 420 (Kan. 1933)).

juries at administrative hearings.<sup>219</sup> But this is not a valid reason to not apply the lawyer as witness rule to administrative hearings. First, concern over jury confusion and improper jury deference to the attorney/advocate's testimony has been criticized as unfounded. The "circumstance that [the attorney] is both advocate and witness does not in itself enhance his standing as a witness or make his advocacy more appealing."<sup>220</sup> Rather, "the lawyer's demeanor and his standing in the community" as well as the lawyer's "reputation or personal magnetism" is relevant, not the fact that the lawyer appears as both advocates and witness.<sup>221</sup> More importantly, almost every state applies the lawyer as witness rule to non-jury judicial trials. If the rule was based solely on the concern of the improper impact on juries by the dual roles of advocate and witness, the lawyer as witness rule would be limited to jury trials. This is not so.<sup>222</sup> This policy reason therefore cannot support the position that the lawyer as witness rule should not apply to administrative hearings.

There are several justifications for the lawyer as witness rule which do not appear to apply differently to judicial trials and administrative hearings. First, it has been argued that the lawyer as witness rule is based on the view that a lawyer who also serves as a witness is more easily impeachable and thus a less effective witness for the lawyer's client.<sup>223</sup> A criticism of this policy reason is that it does not explain why informed client waiver is not permitted under the ABA Model Code or ABA Model Rules as adopted in the majority of states.<sup>224</sup> However, to the extent there is some validity to these issues of impeachability and effectiveness, this concern is not

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219. See *Int'l Paper Co. v. Wilson*, 805 S.W.2d 668, 670 (Ark. Ct. App. 1991); *United States v. Scandia Interiors, Inc.*, 1 OCAHO 271 (Dep't of Justice 1990), 1990 WL 512159; *In re Certain Salinomycin Biomass and Preparations Containing Same*, USITC Inv. No. 337-TA-370 (May 1995), 1995 WL 945673; *In re Certain Convertible Rowing Exercisers*, USITC Inv. No. 337-TA-212 (July 1995), 1985 WL 303746.

220. Enker, *supra* note 212, at 461 (quoting John F. Sutton, Jr., *The Testifying Advocate*, 41 TEX. L. REV. 477, 480 (1963)).

221. *Id.*

222. California appears to be the only state whose lawyer as witness rule is expressly limited to jury trials. See RULES OF PROF'L CONDUCT OF THE STATE BAR OF CALIFORNIA R. 5-210 (1988).

223. See MODEL CODE OF PROF'L RESPONSIBILITY EC 5-9 (1980).

224. See Enker, *supra* note 212.

any different in an administrative adjudication or a judicial proceeding.

Another policy reason in support of the lawyer as witness rule unrelated to a jury is that when the attorney/advocate also testifies, the opposing party is injured, in that opposing counsel may be handicapped in challenging the credibility of a fellow attorney.<sup>225</sup> This reason is based on the belief that the "professional fraternity"<sup>226</sup> of attorneys will feel constrained in cross examining the opposing attorney based on some sense of professional courtesy.<sup>227</sup> Although this concern for civility among attorneys is debatable, to the extent it is a legitimate reason for the lawyer as witness rule, it would seem to apply equally in judicial and administrative proceedings.

Also offered as a reason for the lawyer as witness rule is that an advocate who becomes a witness is placed in an "unseemly and ineffective position of arguing his own credibility."<sup>228</sup> Although this reason has been called "too insubstantial,"<sup>229</sup> it does seem to have some validity. More importantly in regards to this article, however, is that the "unseemliness," whatever its degree, would seem equal in a judicial or administrative forum.

Another explanation for the lawyer as witness rule is "to safeguard . . . against the temptation of an attorney, in his zeal for his client's interest, to color his statements."<sup>230</sup> Although the validity of this policy reason is questionable in that it presumes a willingness of an attorney to testify falsely while under oath, its validity (or lack thereof) is not dependent on whether the proceeding is judicial or administrative.

Professor Wigmore, although disagreeing that lawyers would in fact distort the truth if permitted to serve as advocate and witness, did justify the lawyer as witness rule on the ground that "the public will think they may, and that the public's respect for the profession and

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225. See MODEL CODE, *supra* note 146, at EC 5-9.

226. See Enker, *supra* note 212.

227. See *Int'l Elecs. Corp. v. Flanzer*, 527 F.2d 1288, 1294 (2d Cir. 1975).

228. See MODEL CODE, *supra* note 146, at EC 5-9.

229. Enker, *supra* note 212.

230. Russell Whitman, *Problems of Professional Ethics*, 9 A.B.A.J. 123, 124 (1933).

confidence in it will be effectively diminished.”<sup>231</sup> Wigmore wrote that this policy was “the most potent and most common reason judicially advanced.”<sup>232</sup> This reason has been accepted by some commentators,<sup>233</sup> and judges,<sup>234</sup> however, it has also been criticized as “at best a makeweight,”<sup>235</sup> and has been rejected as a legitimate basis for the prohibition by at least one court.<sup>236</sup> If it is assumed that there is some validity to this argument, it might be argued that the public’s perception of the legal profession is impacted more by attorneys in high profile judicial trials, especially criminal cases, than attorneys representing clients in administrative hearings. On the other hand, there are administrative proceedings such as zoning hearings which do attract public attention. Therefore, it seems that to the extent (if any) the public’s respect for the legal profession supports the lawyer as witness rule, it provides support equally to its application in both judicial and administrative proceedings.

The final justification to the lawyer as witness rule focuses on the inconsistency between the roles of advocate and witness. The role of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.<sup>237</sup> A witness vouches for the truth of the witness’ testimony. Argument, however, derives from the “force of its reason . . . [w]hether the lawyer personally believes in his client’s cause is irrelevant to the evaluation of [the lawyer’s] argument.”<sup>238</sup> As one commentator has written:

It is precisely because the lawyer is not a witness who personally vouches for what he says, but an advocate whose arguments are addressed to reason and stand or fall as they are objectively persuasive, that he is able to represent either side of the issue . . . [as well as]

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231. JOHN HENRY WIGMORE, EVIDENCE § 1911(2) (3d ed. 1940) (emphasis omitted).

232. *Id.*

233. Enker, *supra* note 212.

234. *See* Anderson Producing Inc. v. Koch Oil Co., 929 S.W.2d 416, 430-432 (Tex. 1996) (Owen, J., dissenting).

235. Enker, *supra* note 212

236. Anderson Producing Inc., 929 S.W.2d at 425.

237. Enker, *supra* note 212.

238. *Id.*

represent the criminal, the weak, the socially and politically unpopular.<sup>239</sup>

By this thinking, the lawyer as witness rule is essential to the integrity of the professional role of an attorney.<sup>240</sup> The "dual relation of attorney and witness in a case is not compatible with the conception of an attorney as an officer of the court."<sup>241</sup> This justification for the lawyer as witness rule appears to be the most satisfying explanation. It is less subject to criticism than the other policy reasons offered to support the lawyer as witness rule, and does not conflict with other possible explanations for the rule. Most importantly to this article, the "inconsistent role" justification for the lawyer as witness rule applies equally to judicial proceedings and administrative adjudications. It thus provides solid support for applying the lawyer as witness rule to administrative hearings.

### *Summary*

The preceding section has set forth the various policy justifications that have been offered to support the lawyer as witness rule in judicial trials. All but two -- jury confusion and undue jury deference to the lawyer's testimony -- apply equally to judicial and administrative proceedings. If the lawyer as witness rule was justified solely in jury cases, its application in administrative adjudications would be inappropriate. This is not so. Just about every state applies the lawyer as witness rule to non-jury judicial trials. Moreover, the policy justifications for the lawyer as witness rule which are not related to a jury are equally valid in administrative adjudications and judicial trials. The most convincing justification -- the inconsistent dual roles of advocate and witness -- applies equally to judicial and administrative proceedings. Therefore, this article's conclusion is that the policy reasons for the lawyer as witness rule support its application in administrative adjudications.

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239. *Id.* at 465.

240. *Id.*; see also *S & S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp.*, 508 N.E.2d 647, 651 n.4 (N.Y. 1987).

241. *United States v. Scandia Interiors, Inc.*, 1 OCAHO 271 (Dep't of Justice 1990), 1990 WL 512159.

As the first part of this article has demonstrated, the present state of the law is not certain. There is authority both applying and not applying the lawyer as witness rule in administrative hearings. It is unclear to what extent this issue has received careful attention by the ABA and by those states that have adopted the ABA formulations of the lawyer as witness rule. One impression is that administrative adjudications were “not on the radar screen” when the lawyer as witness rule was adopted in most states. Some authorities on both sides of the issue appear to either apply or not apply the lawyer as witness rule in administrative hearings without any consideration whether the rule in fact does or should apply. In states, such as Virginia, which have considered the issue, the decision was made that the lawyer as witness rule should apply to administrative hearings. The ALI’s Restatement of the Law Governing Lawyers also takes this position.

## VI. PROPOSED LAWYER AS WITNESS RULE FOR ADMINISTRATIVE ADJUDICATIONS

It is beyond dispute that today administrative adjudications play a significant role in our legal system. Decisions of the utmost importance, impacting on liberty, economic, and societal rights, are made at administrative adjudications. The development and growth of central panels in the states as well as the continuing increase in the professionalization of administrative adjudicators have led to increased reliance on administrative adjudications to resolve important matters of personal and public rights. The gap between judicial trials and administrative adjudications has never been smaller than it is today, and this gap will continue to decrease. There is no difference in the role of the attorney/advocate at a judicial trial and at an administrative adjudication. The role of attorney/advocate is equally inconsistent with the role of witness in an administrative adjudication as it is in a judicial trial. Therefore, there appears to be no reason why an attorney/advocate should be permitted to testify as a witness at an administrative adjudication while prohibiting the attorney/advocate from testifying as a witness at a judicial trial. Therefore, this article’s conclusion is that a “lawyer as witness” rule should apply at administrative adjudications.

This conclusion, however, does not necessarily mean that the “lawyer as witness” rule should be identical in both judicial and

administrative forums. It is not necessarily advisable that judicial adjudication and administrative adjudication always be treated equally. Failure to recognize and account for differences in the two adjudicative processes would defeat the purpose of administrative adjudication. Proposals in this area of law should recognize that administrative adjudications exist to provide a more flexible, accessible alternative to judicial trials. Therefore, although this article proposes that a lawyer as witness rule apply in administrative adjudications, it is proposed that such a rule differ in some respects than the ABA formulations of the rule currently in effect in a majority of states.

It is first suggested that the "substantial hardship" exception which is part of the ABA's formulation of the lawyer as witness rule, and followed by the majority of states, not be the standard for an exception to an administrative adjudication lawyer as witness rule. This article proposes that a more flexible exception be adopted that would allow an attorney/advocate to testify as a witness at an administrative hearing in more situations than the substantial hardship exception would permit in judicial trials. Under this proposal, an attorney/advocate could testify as a witness at an administrative hearing if there was a showing of "some hardship" unless the opponent of the testimony could establish prejudice. A motion would need to be filed with the administrative law judge by the attorney/advocate who sought to testify as a witness setting forth why hardship would result to the attorney's client if the attorney were disqualified from representation at the hearing. Factors relevant to this inquiry would include: (1) the length of time the attorney has been on the case;<sup>242</sup> (2) whether the attorney stands in a unique position in understanding the case;<sup>243</sup> (3) whether disqualification would cause delay in the proceedings;<sup>244</sup> (4) whether the agency is operating under any time limits by statute to hold the hearing or

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242. See *In re Houston Lighting & Power Co.*, 21 N.R.C. 1707 (1985), 1985 NRC LEXIS 73 (attorney involved for twelve years).

243. See *Int'l Paper Co. v. Wilson*, 805 S.W.2d 668 (Ark. Ct. App. 1981) (attorney in unique posture of knowing the weakness and strength of client's lawsuit).

244. See *In re Certain Salinomycin Biomass and Preparations Containing Same*, USITC Inv. No. 337-TA-370 (May 1995), 1995 WL 945673 (substantial delay would be required if substitute counsel was required).

render a decision;<sup>245</sup> (5) the complexity of the case and whether other counsel could take over responsibility for the hearing;<sup>246</sup> (6) the professional relationship between the client and the attorney in both terms of length of the relationship and client dependence upon the attorney's advice;<sup>247</sup> (7) additional expense to the client if the attorney was disqualified;<sup>248</sup> and (8) how crucial the testimony of the attorney is to the case.<sup>249</sup> A showing of "distinctive value" of the testimony by the attorney/advocate should not be required.<sup>250</sup> The claim of hardship, however, should be based on "more than idle speculation."<sup>251</sup> Also relevant to this motion to permit the attorney/advocate to testify at the administrative hearing would be when it was filed, and when the need for the testimony from the attorney/advocate was recognized. Motions to permit such testimony should be looked with disfavor if the need for the testimony was known well before the hearing but the motion was filed so close to the hearing that disruption of the hearing process is unavoidable. The formality of the administrative proceeding is also relevant. It is submitted that exceptions to the lawyer as witness rule should be granted more liberally when the administrative process is intended to be informal. More formal administrative proceedings would require a stronger showing of hardship than informal hearings. For example, an exception to the lawyer as witness prohibition should be granted more liberally in state motor vehicle administration "points" cases than at a nuclear power plant licensing hearing.

Once a showing of hardship has been made, the ALJ should grant the motion to permit the attorney/advocate to testify unless the

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245. See *In re Certain Convertible Rowing Exercisers*, USITC Inv. No. 337-TA-212 (July 1985), 1985 WL 303746.

246. *Id.*

247. *Id.*

248. *Contra In re Certain Plastic Light Duty Screw Anchors*, USITC Inv. No. 337-TA-158 (Jan. 1984), 1984 WL 273813 (additional expense insufficient to prove substantial hardship).

249. *United States v. Scandia Interiors, Inc.*, 1 OCAHO 271 (Dep't of Justice 1990), 1990 WL 512159.

250. *Contra* MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(B) (1980) (requiring showing of "distinctive value"); see also *In re Certain Plastic Light Duty Screw Anchors*, USITC Inv. No. 337-TA-158 (Jan. 1984), 1984 WL 273813.

251. See *In re Certain Convertible Rowing Exercisers*, USITC Inv. No. 337-TA-212 (July 1985), 1985 WL 303746.



opposing party can prove prejudice.<sup>252</sup> General allegations of prejudice, such as inability to effectively cross examine opposing counsel because of professional courtesy, should not be sufficient. Rather, prejudice must be particularized. This proposed lawyer as witness rule for administrative adjudications should also make clear that if disqualification is required, other members of the disqualified attorney's law firm can represent the client.<sup>253</sup> Moreover, under this article's proposal, if disqualification was required, the disqualified attorney could still remain counsel of record and participate in pre-hearing and post-hearing matters.<sup>254</sup>

There appear to be two avenues to the adoption of a lawyer as witness rule for administrative adjudications. One approach would be to petition those responsible for the rules of professional conduct in each state, typically the highest court in the state or the state bar association, for adoption of a "lawyer as witness" rule expressly applicable at administrative adjudications. The ABA should also be lobbied to expressly recognize application of the "lawyer as witness" rule to administrative adjudications in its Model Rules. Another approach would be for adjudicating agencies, including central panels, to adopt a procedural rule covering the admissibility of testimony from an attorney who is also representing a client at that adjudicatory hearing. This could be easily accomplished pursuant to each agency's already existing power to adopt regulations to govern its own hearings.<sup>255</sup> This second approach may be preferable to seeking a change in the rules of professional conduct in the states for a few reasons. First, the procedural rule approach could be more easily accomplished. Secondly, the "lawyer as witness" rule could be fashioned to account for differences among different agencies. It is conceivable that an unemployment insurance agency might adopt broader exceptions than those adopted by an agency regulating

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252. *See* *Int'l Paper Co. v. Wilson*, 805 S.W.2d 668, 671 (Ark. Ct. App. 1981) ("[b]alancing the claimant's interest against the potential prejudice to the opposing party," disqualification was not warranted).

253. *See In re Certain Salinomycin Biomass and Preparations Containing Same*, USITC Inv. No. 337-TA-370 (May 1995), 1995 WL 945673.

254. *See* *Scandia Interiors, Inc.*, 1 OCAHO 271.

255. *See, e.g.*, MD. CODE ANN., STATE GOV'T § 9-1604(a)(8) (West 2004) (authorizing the chief administrative law judge of the Maryland Office of Administrative Hearings to adopt rules of procedure for administrative hearings).

corporate securities. Adoption by federal agencies of a lawyer as witness rule would also avoid conflict of laws issues over which states' rules of professional conduct should apply in federal administrative adjudications. This issue appears to have arisen in past cases.<sup>256</sup> All attorneys, no matter where licensed, would be bound by the same rule practicing before a particular agency. Under current practice, an attorney licensed in Maryland appearing before the Federal Communications Commission might be permitted to serve as advocate and witness under the holding of *Heard v. Foxshire Associates, LLC*,<sup>257</sup> while an attorney licensed in Virginia appearing in the same hearing would not be able to serve as both advocate and witness.<sup>258</sup>

## VII. CONCLUSION

A lawyer as witness rule which prohibits an attorney from serving as both an advocate and witness in the same proceeding should be applied in administrative adjudications. A rule which expressly adopts this position should be adopted either by the states in their rules of professional conduct or by agencies in their procedural rules. A rule which recognizes a broader exception than that applied in judicial proceedings may be appropriate in administrative adjudications because of the desire to maintain flexibility and less formality in the administrative process.

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256. *See* Appeal of B.G.W. Ltd. P'ship, GSBCE No. 10501 (Aug. 1991), 1991 WL 16871 (discussing whether to apply District of Columbia or Virginia rule).

257. *Heard v. Foxshire Assocs., LLC*, 806 A.2d 348 (Md. App. 2002).

258. *See* RULES OF THE SUPREME COURT OF VIRGINIA, RULES OF PROF'L CONDUCT R. 3.7 (2000). A possible problem might be created if an agency adopted a lawyer as witness rule with broader exceptions than provided in the rules of professional conduct which govern the attorney who wants to testify and serve as advocate. That attorney could conceivably be subject to discipline even though in compliance with the agency's rules. This might be true, for example, for an attorney licensed in Virginia who sought to act as advocate and witness before an agency that granted exceptions liberally. Hopefully, consensus could be reached that would avoid this problem.